(1) Supreme Court, U.S.
FILED
961033 DEC 27 1996
OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

Petition For Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Arthur Guy Kaplan
Kaplan & Kaplan, P.A.
11 E. Mt. Royal Avenue
Baltimore, MD 21202
(410) 752-2090
Counsel for Petitioner

53 pp

QUESTIONS PRESENTED

1. Whether principles of federalism require federal appellate courts to follow a controlling intervening state court decision that is filed before the federal appellate court issues its judgment and which specifically rejects the standard used and the case law relied on by the federal appellate court if the federal appellate court becomes aware of the controlling state court decision before the date that a Petition for Certiorari is due in this Court.

2. Whether orderly administration of state law in federal courts requires federal appellate courts to follow a controlling intervening state court decision that is filed before the federal appellate court issues its judgment and which specifically rejects the standard used and the case law relied on by the federal appellate court if the federal appellate court becomes aware of the controlling state court decision before the date that a Petition for Certiorari is due in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT	3
(A) Intervening Controlling Decision By Maryland's Highest Court	4
(B) Unusual Timing Of The Maryland Court's Decision	10
(C) Proceedings Below	11
REASONS FOR GRANTING THE PETITION	12
I. The Failure Of The Court Of Appeals To Apply Intervening Judicial Decisions Of Maryland's Highest Court Is In Conflict With Decisions Of This Court	13
II. This Case Raises An Important Question Of The Orderly Administration Of State Law In Federal Courts	15
CONCLUSION	18
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Blaauw v. Grand Trunk Western R. Co., 380 U.S. 127, 85 S.Ct. 806 (1965)	14
Boston and Maine Corp. v. Town of Hampton, 7 F.3d 281, 252 (1st Cir. 1993)	16
Bradley v. Richmond School Board, 416 U.S. 696; 94 S.Ct 2006 (1974)	14, 16, 17
Braniff Airways, Inc. v. Curtiss-Wright Corporation, 424 F.2d 427 at 429-430 (2nd Cir. 1970), *Cert denied* 400 U.S. 820 (1970)	15
Bundy Tubing Company v. Royal Indemnity Company, 298 F.2d 151 (6th Cir. 1962)	7
Conner v. Simler, 367 U.S. 486, 81 S.Ct. 1679 (1961)	14
Davis v. Smith, 607 F.2d 535, 540 (2nd Cir. 1978)	16
Ed Winkler & Son, Inc. v. Ohio Casualty Insurance Co., 51 Md. App. 190, 441 A.2d 1129 (1982)	8, 9, 10
Erie Railroad Co. v. Thompkins, 304 U.S. 64, 58 S.Ct. 817 (1938)	13, 14
First Newton Nat. Bank v. Gen. Cas. Co., 426 N.W.2d 618, (Iowa 1988)	7

Cases — Page

Harleysville v. Harris & Brooks, 248 Md. 148, 235 A.2d 556 (1967)..... 7

Hauenstein v. Saint Paul-Mercury Indem. Co., 242 Minn. 354, 65 N.W.2d 122 (1954)..... 8

Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015 (1944)..... 14, 15, 16, 17

IA Construction Corp. v. T & T Surveying, Inc., 822 F. Supp. 1213 (D.Md. 1993)..... 8, 9, 10

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 849, 110 S.Ct. 2006, 2016 (Scalia J. concurring)..... 17

Lawrence On Behalf Of Lawrence v. Chater, ___ U.S. __ 116 S.Ct. 604 (1996)..... 14, 15

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965)..... 14

Marino v. Ortiz, 888 F.2d 12, 13 (2nd Cir. 1989) *Cert denied* 495 U.S. 931 (1990)..... 16

Reliance Insurance Co. v. Mogavero, 640 F. Supp. 84 (D.Md. 1986)..... 9

Robinson v. Story, 469 U.S. 1081, 105 S.Ct. 583 (1984)..... 15

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217 (1991)..... 13

Cases Page

Sheets v. Brethern Mutual, 342 Md. 634, 679 A.2d 540 (1996).....4, 6, 7, 8, 9, 10, 11, 13

Stutson v. U.S., __ U.S. __, 116 S.Ct 611 (1996) (Scalia J. dissenting) 14

United States v. Security Industrial Bank, 459 U.S. 70, 103 S.Ct. 407 (1982)..... 14

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S.Ct. 347 (1941)..... 14, 17

Zipfel v. Halliburton Co., 861 F.2d 565.567 (9th Cir. 1988)..... 16

STATUTES

MD. REAL PROP. CODE ANN. §10-202 (1988 Replacement Volume)..... 3

MD. REAL PROP. CODE ANN. §10-203 (1988 Replacement Volume)..... 3

MD. REAL PROP. CODE ANN. §11-131 (1995 Supp.)..... 3

MD. COMMERCIAL LAW CODE ANN. §13-301 (1995 Supp.)..... 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS,

Petitioner,

v.

CONTINENTAL INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported. App. 1a. The District Court entered its Final Order on July 10, 1995. App. 12a.

JURISDICTION

i The judgment and opinion sought to be reviewed was entered by the Fourth Circuit in an unpublished opinion on August 6, 1996. App. 1a. Petitioner also seeks review of the Court of Appeals Order denying Petitioner's Petition to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En

Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending that was entered on December 16, 1996. App. 10a.

ii Petitioner filed a timely Petition for Rehearing that was denied on September 3, 1996. App. 5a.

iii Petitioner filed a Motion to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending on September 20, 1996 and the Petition was denied on December 16, 1996.

iv On November 21, 1996 the Chief Justice extended Petitioner's time to file its Petition for Certiorari to and including January 1, 1997. App. 8a.

The Jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTORY PROVISION INVOLVED

MD. REAL PROP. CODE ANN. §10-202 (1988 Replacement Volume).

MD. REAL PROP. CODE ANN. §10-203 (1988 Replacement Volume).

MD. REAL PROP. CODE ANN. §11-131 (1995 Supp.).

MD. COMMERCIAL LAW CODE ANN. § 13-301 (1995 Supp.).

STATEMENT

Petitioner, Lords Landing Condominium Council of Unit Owners[1], (The Unit Owners), brought suit against Respondent Continental Insurance Company, (Continental), in the Circuit Court for Prince George's County, Maryland for breach of a Commercial Liability Insurance Policy. The unit owners had obtained a $1.1 million dollar judgment against Continental's insured for damages arising out of work performed by the insured's subcontractors in constructing the Condominium. The Judgment against Continental's insured was based on misrepresentations and omissions under Maryland's Consumer Protection statute and breach of implied and express statutory warranties under Maryland's Real Property Code.[2] The unit owners sued Continental under a state subrogation statue for failing to pay that judgment.

Continental removed the action pursuant to 28 USC § 1446(a) to the federal district court for Maryland. Jurisdiction of the district court was invoked because of diversity of citizenship pursuant 28 USC § 1332.

---

1 Petitioner does not have any parent companies or subsidiaries.

2 Petitioner's sued Continental under §§ 10-202 - 10-203 and 11-131 of Maryland's Real Property Code and §§ 13-301(1) 13-301(2), 13-301(3) and 13-301(9) of Maryland's Consumer Protection Counts. The jury found for Continental's insured on each Consumer Protection Count that required scienter but the jury found against Continental's insured for misrepresentations, omissions, or statements by the insured regarding the quality, useful life or characteristics of the common elements. App. 25a - 26a. The jury found for Petitioner on each of the express and implied warranty counts. App. 24a - 25a.

The threshold question in this case was whether the property damage giving rise to the $1.1 million verdict was caused by an occurrence. The district court applied an objective test for occurrence and held that as a matter of law, property damage that is the natural, probable consequences of poor workmanship and omissions is not caused by an occurrence as defined by the policy. App. 3a. The Court of Appeals for the Fourth Circuit affirmed the trial court on August 6, 1996 and it rejected the unit owners argument that Maryland State law required an occurrence to be determined by a subjective test that viewed the accident component of an occurrence from the prospective of whether the insured intended or expected the damage. App. 3a.

(A) Intervening Controlling Decision By Maryland's Highest Court

Of primary importance to the consideration of the questions presented in this case is the serious doubt that an intervening decision by Maryland's highest court casts on the validity of the Fourth Circuit's affirmance of the trial court. Maryland's highest court, on July 26, 1996, issued a controlling decision on what constitutes an occurrence or accident under Maryland insurance law. ***Sheets v. Brethern Mutual***, 342 Md. 634, 679 A.2d 540 (1996). Neither the parties nor the Fourth Circuit were aware of this decision prior to the Fourth Circuit's ruling on August 6, 1996. See part B infra. The following is a comparison of the Fourth Circuit's ruling with the intervening Maryland decision.

1. In its August 6, 1996 opinion the Fourth Circuit affirmed the trial court and defined the issue as follows:

The district court held that as a matter of law,

> property damage that is the natural, probable consequence of poor workmanship and omissions is not caused by an occurrence as defined by the policy. The court noted that there was no occurrence whether it was the subcontractor or a general contractor that was involved.
>
> Appealing the district court's judgment the unit owners contend that "the accident component of an occurrence must be viewed subjectively, and where the injury is not expected or intended from the standpoint of the insured an occurrence takes place." This contention, however, is based on the policy's exclusions and fails to take into account the policy's threshold requirement that property damage be caused by an "occurrence."
>
> ...Accordingly, we must first address whether the loss was caused by an occurrence or accident.

App. 3a.

2. In its July 26, 1996 decision the Maryland Court Of Appeals rejected the natural and probable consequences test.

(a) Maryland's highest court explained that the adoption of an objective test would render the policy meaningless.

> If we were to adopt an objective standard and hold that the term `accident' as used in

> liability insurance policies excludes coverage for damage that *should have* been foreseen or expected by the insured, such insurance policies would be rendered all but meaningless.

Id. *Sheets*, 342 Md. at 653, 679 A.2d at 549

(b) When analyzing cases that applied the natural and probable consequences test Maryland's highest Court said:

> The leading cases holding that liability insurance policies covering damages caused by "accident" do not cover damages which are the natural and probable consequences of negligent acts were decided by the United States Court of Appeals for the Tenth Circuit...
>
> The troublesome aspect of these cases is that their interpretation of the term "accident" severely limits the applicability of general liability policies:
>
> > "[E]ven... those courts which follow [this interpretation recognize]... that it so greatly restricts the insurer's liability as to render the policy valueless or even meaningless, and denies coverage for what is the predicate of any likely liability against the insured. As one court has pointed out, the

> insured himself is not liable where damage or injury is the unforeseeable result of his negligence; and where the damage or injury is foreseeable, so that the insured is liable, his insurer is not liable..." (Footnotes omitted).

Id. *Sheets*, 342 Md. at 646-647, 679 A.2d at 546.

3. Maryland's highest court then announced a subjective test for determining the accident component of an occurrence.

> Although our prior cases may have been less than clear in explaining the relevant inquiry, we hold today that an act of negligence constitutes an "accident" under a liability insurance policy when the resulting damage was "`an event that takes place without [the insured's] foresight or expectation.'" *Harleysville*, 248 Md. at 154, 235 A.2d at 559 (citation omitted). In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an "accident" under a general liability policy. *Accord Bundy*, 298 F.2d at 153 (holding that negligent manufacture of metal tubing was an accident because resulting damage was "unforeseen, unexpected and unintended"); *First Newton Nat. Bank v. Gen. Cas. Co.*, 426 N.W.2d 618, 625 (Iowa 1988) (holding that there is an accident if the insured "does not expect or intend both it and some injury");

> *Hauenstein v. Saint Paul-Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122, 126 (1954) (holding that an accident is an "unexpected, unforeseen, or undesigned happening or consequence").

Id. *Sheets*, 342 Md. at 652, 679 A.2d at 548-549.

4. The Fourth Circuit rested its decision on the holding in *IA Construction Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993); *Ed Winkler & Son, Inc. v. Ohio Casualty Insurance Co.*, 441 A.2d 1129, 1132 (Md. App. 1980), and Appleman, Insurance Law and Practice Volume 7A § 4492 and stated:

> "Under Maryland law in the context of insurance law `accident' means an `undersigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force, but it does not mean the natural and ordinary consequences of a negligent act.'" *IA Construction Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (quoting *Ed. Winkler & Son, Inc. v. Ohio Casualty Ins. Co.*, 441 A.2d 1129, 1132 (Md. App. 1980) (quoting 7A Appleman, Insurance Law and Practice § 4492 at 17 (Berdal ed. 1979))) (holding that claims against contractor for work performed in reliance upon negligent work of another contractor did not constitute "occurrence" under general liability policy). Occurrence "does not include the normal, expected consequences of poor workmanship."

Reliance Ins. Co. v. Mogavero, 640 F. Supp. 84, 86 (D.Md. 1986).

App. 3a - 4a.

5. In its July 26 opinion in *Sheets* the Maryland Court of Appeals expressly rejected the cases relied on by the Fourth Circuit and the test for "accident" applied in *Ed Winkler*, *IA Construction*, and 7A § 4442 of Appleman, and stated:

> We recognize that our holding today may be inconsistent with language in at least one Court of Special Appeals opinion that focused on the foreseeability of damage to determine whether negligence constituted, an accident. In *Ed Winkler & Son v. Ohio Cas. Ins.*, 51 Md. App. 190, 441 A.2d 1129 (1982), the Court of Special Appeals held that a wrongful accusation of theft by an insured was not an "accident." 51 Md. App. at 195-96, 441 A.2d at 1132-33. Stating that an "accident" is not "`the natural and ordinary consequences of a negligent act,'" *Ed Winkler*, 51 Md. App. at 195, 441 A.2d at 1132, the intermediate appellate court relied on Appleman's INSURANCE LAW AND PRACTICE, which in turn relied on the Tenth Circuit. See 7A INSURANCE LAW AND PRACTICE § 4492 at 17 (*citing Neale supra*). For the reasons we have explained, *supra*, we decline to adopt this restrictive interpretation of the term accident. Accordingly, to the extent *Ed Winkler* is inconsistent with our holding today, it is disapproved.[4]

Id. Sheets, 342 Md. at 654, 679 A.2d at 550.

> 4 At least one other case applying Maryland law has also relied on *Ed Winkler & Son v. Ohio Cas. Ins.*, 51 Md. App. 190, 441 A.2d 1129 (1982), for the proposition that an "accident" is not "`the natural and ordinary consequences of a negligent act.'" *Ed Winkler*, 51, Md. App. at 195, 441 A.2d at 1132. *See IA Constr. Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (holding that a surveying error is not an "occurrence" under Maryland law).

Id. Sheets, 342 Md. at 654, 679 A.2d at 550 footnote 4.

(B) Unusual Timing Of The Maryland Court's Decision

In the present case the controlling Maryland Court of Appeals decision was rendered on July 26, 1996 and thus was in effect prior to the Fourth Circuit's ruling. The Appeals Court and the parties were unaware of the decision because the West Advance Sheets containing the *Sheets'* decision did not come out until September 6, 1996. These advance sheets are mailed by bulk mail and they do not reach law offices and libraries for five to eight days from the date of the advance sheets are mailed.[3] Thus, the West Advance

---

3 An Affidavit from the Circulation/Reference Librarian of the University of Baltimore Law Library was filed with the Fourth Circuit. This Affidavit shows that the West Advance Sheets containing the Maryland Reporters did not reach law libraries until September 13, 1996. The West Atlantic Second Advance Sheets for Maryland did not reach law libraries until September 18, 1996. App. 13a. An Affidavit from counsel's receptionist and a fax transmission from West Publishing Co. was also

Sheets would have reached libraries after the mandate was issued.

On Tuesday evening at approximately 8:00 p.m. on September 17, 1996 counsel reviewed the "words and phrases" section of the West Atlantic Second advance sheet dated September 6, 1996 and discovered that the Maryland Court of Appeals had ruled in the *Sheets* decision. Counsel read the decision that night, researched the issue of recalling the mandate and application of intervening state law the next day, drafted the Petition to Recall on Thursday and filed it with the Fourth Circuit Court of Appeals on Friday, September 20, 1996.

Respondent in its October 8, 1996 Opposition to the Petition to Recall pointed out that a legal publication in Baltimore Maryland, The Daily Record, had reported the *Sheets* decision before the Fourth Circuit's August 6, 1996 opinion and that *Sheets* had become available on Lexis on August 7, 1996. However, it appears that Respondent's counsel, like Petitioner's counsel, was unaware of the decision because no effort was made by Respondent to inform the court of the decision. In any case the Appeals Court did not have any opportunity to apply *Sheets* before it rendered its August 6, 1996 opinion.

(C) Proceedings Below

The Fourth Circuit issued its opinion on August 6, 1996. The unit owners on August 16, 1996 filed a timely Request for a Rehearing and Suggestion for Rehearing En

---

filed with the Fourth Circuit. App. 15a - 17a.

Banc which was denied on September 3, 1996. App. 5a. The mandate was issued on September 11, 1996. App. 6a. On September 20 the unit owners filed their:

> "Petition to Recall and Stay Mandate and to Renew Appellant's Motion for Rehearing and En Banc Review and/or Leave to File a Second Petition for Rehearing and En Banc Review Because of a Controlling Change in Maryland Law While Case Was Pending." (Motion to Recall)

After reviewing the Motion to Recall the Fourth Circuit, on October 1, 1996, requested that Respondent "file a response to Appellant's Petition for rehearing and suggestion for rehearing in banc." App. 7a. Respondent filed its response on October 8, 1996 and one of the issues Respondent raised was the authority of the Fourth Circuit to recall the mandate and rehear the case after the issuance of the mandate. The unit owners then filed a reply on October 11, 1996. The Fourth Circuit denied the Petition to Recall on December 16, 1996. App. 10a.

The unit owners Petition for Writ of Certiorari was originally due before this Court on December 2, 1996. The unit owners applied for an extension of time to allow the Fourth Circuit to make a ruling and Chief Justice Rehnquist granted an extension through and including January 1, 1997. App. 8a.

REASONS FOR GRANTING PETITION

In its July 26, 1996 opinion Maryland's highest court rejected the natural probable consequences test for determining what constitutes an occurrence and explained

that if they were "to adopt an objective standard ... such insurance policies would be rendered all but meaningless." Maryland's highest court clarified any confusion in its prior case law and it specifically rejected the test for "accident" applied in the very cases relied on by the district court and Fourth Circuit below. Compare *Sheets*, 342 Md. at 652 - 654, 679 A.2d at 548-550 with the Fourth Circuits' August 6, 1996 Opinion in this case. App. 1a.

The Circuit Court's failure to follow the law of the state of Maryland conflicts with well reasoned and long established principles of federalism. The Circuit Court's decision denied the unit owners the benefit of the laws of forum state and applied a test that rendered the policy of insurance virtually meaningless under Maryland law. In addition to the important questions of federalism that this case raises it also provides this court with a rare opportunity to offer guidance to federal courts on the orderly administration of state law in the federal judicial system.

I. The Failure Of The Court Of Appeals To Apply Intervening Judicial Decisions Of Maryland's Highest Court Is In Conflict With Decisions Of This Court.

In our system of federalism *Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum state that is in existence at the time it renders its decision absent a federal statutory or constitutional directive to the contrary. *Salve Regina College v. Russell*, 499 U.S. 225, 226, 111 S.Ct. 1217, 1218 (1991); *Erie Railroad Co. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). Similarly where a federal court of appeals' decision on a point of state law is cast in doubt by an intervening decision of a states highest court while the case is on direct review it has become the practice of this court to vacate and remand so that the

question can be decided by judges familiar with state law. *Stutson v. U.S.*, __ U.S. __, 116 S.Ct 611, 612 (1996) (Scalia J. dissenting) (citing *Huddleston v. Dwyer*, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018 (1944), *Lawrence On Behalf Of Lawrence v. Chater*, ___ U.S. ___ 116 S.Ct. 604, 606-608 (1996); See *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 540-543, 61 S.Ct. 347, 349-350 (1941); *Blaauw v. Grand Trunk Western R. Co.*, 380 U.S. 127, 85 S.Ct. 806 (1965); *Conner v. Simler*, 367 U.S. 486, 81 S.Ct. 1679 (1961); *See also United States v. Security Industrial Bank*, 459 U.S. 70, 81, 103 S.Ct. 407, 413 (1982) (the principle that... judicial decisions operate retrospectively is familiar to every law student); *Bradley v. Richmond School Board*, 416 U.S. 696, 711; 94 S.Ct 2006, 2016 (1974) (distinction between applying a change in the law before time to petition for certiorari has passed and after final judgment); *Linkletter v. Walker*, 381 U.S. 618, 622, 85 S.Ct. 1731, 1734 (1965) (distinction between cases still pending on direct review and finality of judgments).

The failure of the Fourth Circuit to apply an intervening judicial decision of Maryland's highest court in a diversity case places its August 8, 1996 decision squarely in conflict with the above cited decisions of this court. This case presents a rare opportunity for this court to reinforce the principles of federalism upon which diversity jurisdiction is based and to enforce *Erie's* mandate.

The unit owners have argued throughout this litigation that Maryland courts applied a subjective analysis to determine if an occurrence took place and the Fourth Circuit's decision denied the unit owners the benefit of applying the law of the forum state to the issues presented in this case.

II. This Case Raises An Important Question Of The Orderly Administration Of State Law In Federal Courts.

Equally important, however, is the opportunity this case gives the court to review the orderly administration of state laws in federal courts. When an intervening judicial decision of a state's highest court comes down so shortly before a federal appeals court decision that it is not applied by the federal court, the federal court should rehear the case if the state court decision is brought to its attention before the time that a petition for certiorari is due in this Court. If the appellate court waits to see if this court grants, cert, vacates and remands, it will only diminish this court's scarce resources. *See Lawrence On Behalf Of Lawrence v. Chater*, _ U.S. ___, 116 S.Ct 604, 606 (1996); *See also Robinson v. Story*, 469 U.S. 1081, 105 S.Ct. 583 (1984). *See also Braniff Airways, Inc. v. Curtiss Wright Corporation*, 424 F.2d 427, 430 (1970).

Considering the difficulty of securing review in this court in diversity cases, lower federal courts rarely obtain guidance on the issue of orderly administration of state law in the federal system. This has led to conflicting opinions about when circuit court's should apply the ruling of this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 1017 (1944). The Second Circuit has recognized that this Court has not defined "precisely what the bounds of the term `sub judice' might be" and it has viewed *Huddleston* as authority to rehear cases based on intervening state law even after Certiorari has been granted. *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427 at 429-430 (2nd Cir. 1970), *Cert denied* 400 U.S. 829 (1970). The Second Circuit has also cited Huddleston for the proposition that mandates should be recalled and rehearings granted when an

intervening decision of this Court comes down before a panel decision is rendered. *Marino v. Ortiz*, 888 F.2d 12, 13 (2nd Cir. 1989) *Cert denied* 495 U.S. 931 (1990); *Davis v. Smith*, 607 F.2d 535, 540 (2nd Cir. 1978).

The Ninth Circuit, at least, in cases where decisions of this Court are involved, will recall a mandate and rehear the case in light of intervening decisions that come down after the federal appeals court has ruled. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988).

The First Circuit, however, has questioned the authority of an appeals court to ever recall a mandate and rehear a case in light of an intervening decision of a state court. *Boston and Maine Corp. v. Town of Hampton*, 7 F.3d 281, 252 (1st Cir. 1993). Moreover, unlike the Second Circuit, the First Circuit does not see *Huddleston* as authority for applying state decisional law after the mandate has issued but before the time for filing a petition for certiorari has run. Id. 7 F.3d at 282.

In the present case the Fourth Circuit has refused to recall its mandate even though the intervening state court decision came down before it rendered its opinion. This puts the Fourth Circuit in direct conflict with holdings of the Second Circuit and decisions of this Court involving "pending" cases.

In *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974) this Court held that changes in the law should be given effect while the case was pending. The Court further pointed out that pending cases were distinguished from final judgments by the lapse or exhaustion of the "availability of appeal" or the passing of the time to petition for certiorari. Id. *Bradley*, 416 U.S. at 711, 94 S.Ct.

at 2016 footnote 14. This holding was based in large part on cases involving retroactive application of state decisional law. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 849, 110 S.Ct. 2006, 2016 (Scalia J. concurring).[4]

The present case then gives this Court the opportunity to give guidance on the issue of whether or not intervening state judicial decisions should be applied by federal court's of appeal to cases that have not become "final" as the term is applied in *Bradley.* Moreover, granting certiorari allows this Court to offer guidance concerning the scope of the term "sub judice" used in *Huddleston* if it is in fact more circumscribed than *Bradley's* definition of "final." In addition, this case gives this Court the opportunity to offer guidance on whether or not federal appeals courts should provide less difference to intervening state court decisions in *Erie* cases than they give to this Court's decisions on federal questions.

The administration of state law in federal courts should be uniform. Yet there is an apparent lack of uniformity among the circuits in applying intervening state decisions before the case becomes "final." This case presents the rare opportunity for this Court to address these issues and the Court should take it.

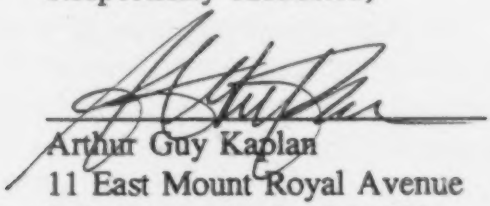
---

4 These cases included *Vandenbark v. Owen- Illinois Glass Co.,* 311 U.S. 538, 543, 61 S.Ct. 347, 350 (1941) which is the case on which *Huddleston* relies. *Huddleston v. Dwyer,* 322 U.S. 232, 237 64 S.Ct. 1015, 1018.

CONCLUSION

The court should grant Certiorari.

Respectfully submitted,



Arthur Guy Kaplan
11 East Mount Royal Avenue
Baltimore, Maryland 21202
(410) 752-2090
Counsel for Petitioner

APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Plaintiff-Appellant,

v.

No. 95-2568

THE CONTINENTAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland at Greenbelt.
Peter J. Messitte, District Judge.
(CA-94-3377-PJM)

Argued: May 6, 1996
Decided: August 6, 1996

Before WIDENER and NIEMEYER, Circuit Judges and PHILIPS, Senior Circuit Judge

---

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Kevin Thornton, KAPLAN & KAPLAN, P.A., Baltimore, Maryland, for Appellant. Gregory Ryder Black, SAUNDERS & SCHMIELER, Silver Spring, Maryland for Appellee. **ON BRIEF:** Jeffrey R. Schmieler, SAUNDERS & SCHMIELER, Silver Spring, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The unit owners of Lords Landing Village Condominium ("unit owners"), having obtained a $1.1 million judgment against the condominium developer, filed this action against the developer's insurance company, Continental Insurance Company ("Continental") to compel Continental to pay the judgment. Applying Maryland law, the district court concluded that the policy issued by Continental did not cover the loss because it did not arise from an "occurrence" within the meaning of the policy. We affirm.

In the underlying action, the unit owners sued the condominium developer, Wellington Homes, for numerous defects in the condominium complex, including a faulty fire protection sprinkler system, faulty insulation, and rotted wood resulting from a subcontractor's failure to prime wood components prior to painting. A jury rendered a verdict in favor of the unit owners against Wellington Homes for breach of express and implied warranties and misrepresentations and awarded the unit owners $1.1 million.

To collect the judgment, the unit owners instituted this action against Continental because it had issued a general liability policy covering Wellington during the applicable period. That policy provides payment for "those sums that [Wellington] becomes legally obligated to pay as damages because of `bodily injury' or `property damage' to which this insurance applies." And property damage is covered only if it is caused by an "occurrence," defined as "an accident,

including continuous or repeated exposure to substantially the same general harmful conditions."

The district court held that as a matter of law, property damage that is the natural, probable consequence of poor workmanship and omissions is not caused by an occurrence as defined by the policy. The court noted that there was no occurrence whether it was the subcontractor or a general contractor that was involved.

Appealing the district court's judgment, the unit owners contend that "the accident component of an occurrence must be viewed subjectively, and where the injury is not expected to intended from the standpoint of the insured an occurrence takes place." This contention, however, is based on the policy's exclusions and fails to take into account the policy's threshold requirement that property damage be caused by an "occurrence." If we were to interpret the policy as urged by the unit owners, we would be collapsing one of the policy's business risks exclusions into a threshold requirement for coverage. The policy in question does not provide coverage for all property damage, but only property damage that is caused by an "occurrence." Only if that threshold coverage is crossed must the exclusion alluded to by the unit owners be addressed, i.e., the exclusion for property damage that was "expected or intended from the standpoint of the insured." Accordingly, we must first address whether the loss was caused by an occurrence or accident.

"Under Maryland law in the context of insurance law `accident' means an `undersigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force, but it does

not mean the natural and ordinary consequences of a negligent act.'" *IA Construction Corp. v. T&T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D.Md. 1993) (quoting *Ed. Winkler & Son, Inc. v. Ohio Casualty Ins. Co.*, 441 A.2d 1129, 1132 (Md. App. 1980) (quoting 7A Appleman, Insurance Law and Practice § 4492 at 17 (Berdal ed. 1979))) (holding that claims against contractor for work performed in reliance upon negligent work of another contractor did not constitute "occurrence" under general liability policy). Occurrence "does not include the normal, expected consequences of poor workmanship." *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84, 86 (D.Md. 1986).

We agree with the district court that the damages awarded in the underlying action for breach of warranties and misrepresentations allegedly resulting from the poor workmanship of a subcontractor were not caused by an "occurrence" within the meaning of Continental's policy. "This is the stuff of the construction trade (and professional malpractice insurance), not a risk protected against by a general liability policy." *IA Construction Corp.*, 822 F. Supp. at 1215 (referring to one contractor's negligence causing liability of another contractor); *see also Mogavero*, 640 F. Supp. at 85 ("[t]his case turns upon one overriding principle: that [insurer] issued a general liability policy, not a performance bond"); *cf. American Home Assurance Co. v. Osbourn*, 422 A.2d 8, 13 (Md. App. 1980) (holding that action against service station operator for trespass and conversion did not constitute "occurrence").

Accordingly, we affirm the judgment of the district court.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 3, 1996

No. 95-2568
CA-94-3377-PJM

LORDS LANDING VILLAGE CONDOMINIUM
COUNCIL OF UNIT OWNERS

Plaintiff-Appellant

v.

THE CONTINENTAL INSURANCE COMPANY

Defendant-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 11, 1996

No. 95-2568
CA-94-3377-PJM

Lords Landing v. Continental Insur Co.

MANDATE

The judgment of this Court dated 8/6/96 takes effect today.

PATRICIA S. CONNOR
ACTING CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
U.S. COURT HOUSE ANNEX
RICHMOND, VIRGINIA 23219

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804) 771-2213

October 1, 1996

Gregory Ryder Black, Esq.
8737 Colesville Road
Suite L-201
Silver Spring, MD 20910

Jeffrey Roger Schmieler, Esq.
8737 Colesville Road
Suite L-201
Silver Spring, MD 20910

Re: 95-2568 Lords Landing v. Continental Insur Co
CA-94-3377-PJM

Dear Counsel:

The Court has requested that you file a response to appellant's petition for rehearing and suggestion for rehearing in banc, filed 9/20/96. Please file your response in the office of the clerk no later than 10/8/96.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Deborah S. Daniel
Deputy Clerk

cc: Kevin Thornton

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE
479-3011

November 21, 1996

Mr. Arthur G. Kaplan
11 East Mount Royal Avenue
Baltimore, MD 21202

Re: Lords Landing Village Condominium
Council of Unit Owners
v. Continental Insurance Company
Application No. A-365

Dear Mr. Kaplan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on November 21, 1996, extended the time to and including January 1, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/

Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE
479-3011

NOTIFICATION LIST

Mr. Arthur G. Kaplan
11 East Mount Royal Avenue
Baltimore, MD 21202

Mr. Jeffrey Schmieler
Saunders & Schmieler
8737 Colesville Road, #L-201
Silver Spring, MD 20910

Clerk
United States Court of Appeals for
the Fourth Circuit
1100 East Main Street
Room 249
Richmond, VA 23219

 Filed December 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2568

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS,

Plaintiff-Appellant,

versus

THE CONTINENTAL INSURANCE COMPANY,

Defendant-Appellee.

ORDER

This case was argued May 6, 1996, and our opinion affirming the district court was filed August 6, 1996. A petition for rehearing by the plaintiff-appellants was denied September 3, 1996, and our mandate was filed September 11, 1996.

On July 26, 1996, the Maryland Court of Appeals deed the case of Sheets v. Brethren Mutual, 342 Md. 634, 679 A.2d 540 (1996), which case did not come to the attention of the plaintiff-appellants before August 30, 1996. The plaintiff-appellants take the position that Sheets should have required a different disposition of this case than the disposition contained in our said decision filed August 6, 1996. The defendant-appellee does not agree that Sheets so requires.

On September 20, 1996, the plaintiff-appellants filed a petition to recall and stay our mandate, a motion to renew their petition for rehearing with en banc review of the same, and a motion to file a second petition for rehearing with en banc review of the same.

We required a response to the said motions and petition, which was filed October 8, 1996.

There having been no request for a poll of the court, the motions or petitions for en banc review in this case, however, the same may be called, shall be, and the same hereby are, denied.

We have considered the motion or petition to recall or stay our mandate, either or both; the motion to renew the plaintiff-appellants' petition for rehearing; and the motion for leave to file a second petition for rehearing. We are of opinion the said petition and motions are without merit.

It is accordingly ADJUDGED and ORDERED that all of the said petitions and motions above shall be, and they hereby are, denied.

With the concurrences of Judge Niemeyer and Judge Phillips.

H.E. Widener, Jr.

/s/

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS Plaintiff	*
v.	*Civil No. PJM 94-3377
CONTINENTAL INSURANCE COMPANY Defendant	*

FINAL ORDER

Upon consideration of Defendant's Motion to Dismiss and/or for Summary Judgment, Plaintiff's Opposition thereto, Plaintiff's Cross-Motion for Summary Judgment, Defendant's Opposition thereto, oral argument having been held on both motions, it is this 10 day of July, 1995, for the reasons stated on the record

ORDERED that Defendant's Motion to Dismiss and/or Motion for Summary Judgment is hereby GRANTED; and it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment is hereby DENIED; and it is further

ORDERED that final judgment is hereby entered in favor of Defendant.

Plaintiff's Motion for Sanctions is hereby deemed to be MOOT.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS
Plaintiff-Appellant *

vs. * Case No. 95-2568

CONTINENTAL INSURANCE COMPANY
Defendant-Appellee *

* * * * * * * * *

AFFIDAVIT

I, Harvey Morrell, hereby certify that I am over 18 years of age and am competent to testify to the matters stated herein which I have personal knowledge thereof:

1. I am the Circulation/Reference Librarian at the University of Baltimore Law Library. As part of my duties I am familiar with the date the WEST ADVANCE SHEETS are received by the library.

2. The WEST ADVANCE SHEETS containing Maryland Reporters generally come into the Law Library five to eight days after the date appearing on the cover page of the WEST ADVANCE SHEETS.

3. The WEST ATLANTIC 2d ADVANCE SHEETS dated September 6, 1996, and containing the case entitled Robert T. Sheets, Jr. et ux. v. The Brethren Mutual Insurance Company, 679 A.2d 540 (Md. 1996), did not arrive at the University of Baltimore Law Library until September 18, 1996.

EXHIBIT 3

4. The WEST ADVANCE SHEETS for the official Maryland Reporters that contain the case of Robert T. Sheets, Jr. et ux. v. The Brethren Mutual Insurance Company 342 Md. 634 (1996), was not received by our library until September 13, 1996. Moreover, this WEST ADVANCE SHEET was not put out on the shelves for public use as of 11:00 a.m. on Friday September 20, 1996.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

/s/_____
Harvey Morrell

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LORDS LANDING VILLAGE CONDOMINIUM COUNCIL OF UNIT OWNERS
Plaintiff-Appellant *

vs. * Case No. 95-2568

CONTINENTAL INSURANCE COMPANY
Defendant-Appellee *

* * * * * * * * *

AFFIDAVIT

I, June Karlin, hereby certify that I am over 18 years of age and am competent to testify to the matters stated herein which I have personal knowledge thereof:

1. I am the receptionist at the Law firm of Kaplan & Kaplan, P. A. As part of my duties I receive, open and stamp all incoming mail. I file the WEST ADVANCE SHEETS in our law library on the day they are received.

2. The WEST ADVANCE SHEETS containing Maryland cases are received in our office sometime after the date appearing on the cover page of the WEST ADVANCE SHEETS.

3. I called and personally spoke to Rose at West Publishing Corporation and she informed me that the WEST ADVANCE SHEETS are mailed each week on Fridays, by 2nd Class Periodical Rate and it usually takes five to seven days for them to arrive. I requested a letter in writing and by fax of this information. I received the fax copy on

EXHIBIT 4

September 20, 1996. A copy is attached to my Affidavit as Exhibit A, that confirms that advance sheets usually arrive within 5-7 days and are mailed 2nd Class Periodical Rate.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true.

/s/_____
June Karlin

17a

WEST PUBLISHING CORPORATION

FAX COVER SHEET

620 OPPERMAN DRIVE EAGAN, MN 55123 (612) 687-8000

DATE 9/20/96

TO:

NAME June Karlin

PHONE 410-752-2090

DEPT. 999-508-082

COMPANY KAPLAN & KAPLAN

RE: ADVANCE SHEETS

FAX # 410 783-2723

FROM:

NAME CHERYL TIETZ

DEPT. ACCOUNTS RECEIVABLE

PHONE 1-800-328-4880 EXT. 76709

FAX # 612 687-6674

NUMBER OF PAGES INCLUDING COVER 1

COMMENTS Your Advance Sheets to the Atlantic Reporter are mailed each week on Fridays. They are sent 2nd class Periodical Rate and usually arrive arrive within 5-7 days. Any problems with getting them in a timely fashion from the U.S. Postal Service should be directed to your Postmaster General.

WESTLAW EXHIBIT A

STATUTES

MD. REAL PROP. CODE ANN. §10-202 (1988 Replacement Volume).

§10-202. Creation of express warranties; exclusion or modification of express warranty.

(a) Creation of warranties. - Express warranties by a vendor are created as follows:

(1) Any written affirmation of fact or promise which relates to the improvement and is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the affirmation or promise.

(2) Any written description of the improvement, including plans and specifications of it, which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms to the description.

(3) Any sample or model which is made a part of the basis of the bargain between the vendor and the purchaser creates an express warranty that the improvement conforms substantially to the sample or model.

(b) Formal words unnecessary. - To create an express warranty, it is not necessary to use formal words, such as "warranty" or "guarantee," or that there be a specific intention to make a warranty. However, an affirmation merely of the value of the improvement or a statement purporting to be an opinion or commendation of the improvement does not create a warranty.

(c) Exclusion or modification of express warranty. - If an express warranty is made under subsection (a), neither words in the contract of sale, the deed, other instrument of grant, nor merger of the contract of sale into the deed or any other instrument of grant is effective to exclude or modify

the warranty. At any time after the execution of the contract of sale, the warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. (An. Code 1957, art. 21, § 10-202; 1974 ch. 12, § 2.)

MD. REAL PROP. CODE ANN. §10-203 (1988 Replacement Volume).

§10-203. Implied warranties.

(a) Warranties which are implied. - Except as provided in subsection (b) or unless excluded or modified pursuant to subsection (d), in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

(1) Free from faulty materials;

(2) Constructed according to sound engineering standards;

(3) Constructed in a workmanlike manner; and

(4) Fit for habitation.

(b) Exception. - The warranties of subsection (a) do not apply to any condition that an inspection of the premises would reveal to a reasonably diligent purchaser at the time the contract is signed.

(c) Implied warranty of fitness for a particular purpose. - If the purchaser, expressly or by implication, makes known to the vendor the particular purpose for which the improvement is required, and it appears that the purchaser relies on the vendor's skill and judgment, there is an implied warranty that the improvement is reasonably fit for the

purpose.

(d) Exclusion or modification of implied warranty.- Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. However, if the contract of sale pertains to an improvement then completed, an implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. (An. Code 1957, art. 21, § 10-203; 1974 ch. 12, § 2; 1976, ch. 572.)

MD. REAL PROP. CODE ANN. §11-131 (1995 Supp.).

§11-131. Warranties.

(a) Application of §§ 10-202 and 10-203; liability of developer for improvements. - (1) The provisions of §§ 10-202 and 10-203 of this article apply to all sales by developers under this title. For the purposes of this article, a newly constructed dwelling unit means a newly constructed or newly converted condominium unit and its appurtenant undivided fee simple interest in the common areas.

(2) If a developer grants an improvement to an intermediate purchase to evade any liability to a purchaser imposed by the provisions of this section, or by § 10-202 or § 10-203 of this article, the developer is liable on the subsequent sale of the improvement by the intermediate purchaser as if the subsequent sale had been effectuated by the developer without regard to the intervening grant.

(b) Warranty on unit from developer to owner. - In addition to the implied warranties set forth in § 10-203 of this article there shall be an implied warranty on an

individual unit from a developer to a unit owner. The warranty on an individual unit commences with the transfer of title to that unit and extends for a period of 1 year. The warranty shall provide:

(1) That the developer is responsible for correcting any defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit; and

(2) That the heating and any air conditioning systems have been installed in accordance with acceptable industry standards and:

(i) That the heating systems is warranted to maintain a 70° (F) temperature inside with the outdoor temperature and winds at the design conditions established by Article 78, § 54J of the Code ("Energy Conservation Building Standards Act"), or those established by the political subdivision as provided in Article 78, § 54J; and

(ii) That the air conditioning system is warranted to maintain a 78° (F) temperature inside with the outdoor temperature at the design conditions established by Article 78, § 54J of the Code ("Energy Conservation Building Standards Act"), or those established by the political subdivision as provided in Article 78, § 54J.

(c) Warranty on common elements.-(1) In addition to the implied warranties set forth in § 10-203 of this article there shall be an implied warranty on common elements from a developer to the council of unit owners. The warranty shall apply to: the roof, foundation, external and supporting walls, mechanical, electrical, and plumbing systems, and other structural elements.

(2) The warranty shall provide the developer is responsible for correcting any defect in materials or workmanship, and that the specified common elements are within acceptable industry standards in effect when the building was constructed.

(3) The warranty on common elements

commences with the first transfer of title to a unit owner. The warranty of any common elements not completed at that time shall commence with the completion of that element or with its availability for use by all unit owners, whichever occurs later. The warranty extends for a period of 3 years.

(4) A suit for enforcement of the warranty on general common elements shall be brought only by the council of unit owners. A suit for enforcement of the warranty on limited common elements may be brought by the council of unit owners or any unit owner to whose use it is reserved.

(d) Limitation of actions - Notice of defect shall be given within the warranty period and suit for enforcement of the warranty shall be brought within 1 year of the warranty period.

(e) Exceptions. - (1) Warranties shall not apply to any defects caused through abuse or failure to perform maintenance by a unit owner or the council of unit owners.

(2) The provision of this section do not apply to a condominium that is occupied and used solely for nonresidential purposes. (1981, ch. 246; 1982, ch. 836, § 3; 1986, chs. 360, 572; 1993. ch. 5, § 1.)

MD. COMMERCIAL LAW CODE ANN. § 13-301 (1995 Supp.).

§13-301. Unfair or deceptive trade practices defined.

Unfair or deceptive trade practices include any:

(1) False, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers;

(2) Representation that:

(i) Consumer goods, consumer realty, or

consumer services have a sponsorship, approval, accessory, characteristic, ingredient, use, benefit, or quantity which they do not have;

(ii) A merchant has a sponsorship, approval, status, affiliation, or connection which he does not have;

(iii) Deteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new; or

(iv) Consumer goods, consumer realty, or consumer services are of a particular standard, quality, grade, style, or model which they are not;

(3) Failure to state a material fact if the failure deceives or tends to deceive;

(9) Deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of any material fact with the intent that a consumer rely on the same in connection with:

(i) The promotion or sale of any consumer goods, consumer realty, or consumer service; or

(ii) A contract or other agreement for the evaluation, perfection, marketing, brokering or promotion of an invention; or

(iii) The subsequent performance of a merchant with respect to an agreement of sale, lease, or rental.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

LORDS LANDING VILLAGE	:	
	:	
Plaintiff	:	
	:	
vs.	:	CAL NO. 92-23723
	:	
WELLINGTON HOMES, ET AL.	:	
	:	
Defendants	:	

VERDICT SHEET

1. Issue One involves implied warranties from Wellington Homes to the Council of Unit Owners at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached this warranty obligation?

   For Plaintiff ___√___

   For Defendant _____

2. Issue Two involves implied warranties from Wellington Homes to each purchaser at Lords Landing Village Condominium. Do you find that Defendant Wellington Homes breached its warranty obligation to the individual purchasers at Lord Landing for common elements?

   For Plaintiff ___√___

   For Defendant _____

3. Issue Three involves express warranties to each purchaser at Lords Landing Village Condominium.

Do you find that Defendant Wellington Homes breached its express warranties to the individual purchasers at Lords Landing for common elements?

For Plaintiff ___√___

For Defendant _____

4. Issue Four is for violations of the Consumer Protection Act and it involves false or misleading statements. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this Issue?

For Plaintiff _____

For Defendant ___√___

5. Issue Five is for violations of the Consumer Protection Act and it involves misrepresentations, omissions or statements by Defendant Wellington Homes that would lead Plaintiffs to believe that the common elements of the condominium had a quality, useful life or characteristics which they do not have. Do you find that Defendant Wellington Homes has violated the Consumer Protection Act under this issue?

For Plaintiff ___√___

For Defendant _____

6. Issue Six is for violations of the Consumer Protection Act and it involves concealment of the conditions at Lords Landing from the Plaintiffs. Do you find that Defendant Wellington Homes violated the Consumer

Protection Act under this issue?

For Plaintiff _____

For Defendant ___✓___

7. Issue Seven is for violation of the Consumer Protection Act and it involves fraudulent misrepresentations by the developer with regard to conditions of the common elements. Do you find that Defendant Wellington Homes violated the Consumer Protection Act under this issue?

For Plaintiff _____

For Defendant ___✓___

If you find in favor of the Defendant on all issues, that ends your verdict.

If you find in favor of the Plaintiff on any one issue, then in what amount do you assess damages?

Amount $1.1 mil